86-885

Supreme Court, U.S.
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No. 86-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BOSTON AND MAINE CORPORATION,
Petitioner,

v.

R.M. LENFEST, JR., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether § 212(b) of the Federal Railroad Safety Act, 45 U.S.C. § 441(b), which prohibits railroads from discriminating against employees who refuse to work when confronted by hazardous conditions posing an imminent danger of death or serious injury, authorizes general strikes and picketing by a railroad union over allegedly hazardous conditions, which would otherwise be unlawful under the Railway Labor Act?

2. Whether under § 212(c) of the Federal Railroad Safety Act, 45 U.S.C. § 441(c), which provides for mandatory arbitration of claims arising under the employee rights provision of the Act, the mere assertion by a railroad union that it is striking and picketing over a hazardous work condition deprives a federal court of jurisdiction to determine whether the strike and picketing meet the statutory requirements for protection, or are otherwise unlawful under the Railway Labor Act?

LIST OF PARTIES

The parties to the proceedings below, in addition to those listed in the caption to this petition, are respondents General Committee of Adjustment of the United Transportation Union (T), J.F. Fiske, Jr., P.E. McHugh, Richard A. Chartrand, T.G. Crowell, John F. Fiske, Jr., C.L. Harris, Joseph B. Kuchieski, Albert H. Lebert, Leo J. MacDonald, Charles W. Paige, Jr., George E. Quackenbush, William J. Rabbitt, R.J. Sawyer, W.C. Taylor, Robert J. Wright, Joseph Sylvain, C.T. Tremblay, R.J. Morani, and D.M. Perigny. All individual respondents were defendants below in their individual capacities and as officers and members of the General Committee of Adjustment.

Petitioner Boston and Maine Corporation is a wholly-owned subsidiary of Guilford Transportation Industries, Inc., a private holding company. Boston and Maine's subsidiaries and affiliates, apart from wholly-owned subsidiaries, are:

Albany Port Railroad Corporation
Albany and Vermont Railway Company
Delaware and Hudson Railway Company
Guilford Aviation Corporation
Guilford Motor Express, Inc.
Hudson River Estates, Inc.
Maine Central Railroad Company
Northern Railroad
Railstar Control Technology, Inc.
Saratoga and Schenectady Railroad Company
Stony Brook Railroad Corporation
Vermont and Massachusetts Railroad Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. The Decision Below Creating A Novel Right of Railroad Unions to Call a General Strike Over an Alleged Safety Dispute Unjustifiably Undermines The Railroad Labor Act's Fundamental Objective of Preventing Strikes	8
II. The Decision Below Conflicts With Decisions of This and Other Courts on Judicial Enforcement of Labor Arbitration Provisions and Threatens to Disrupt Labor Relations in the Railroad Industry	17
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: Page

Air Line Pilots Ass'n. v. *Trans World Airlines*, 713 F.2d 940 (2d Cir. 1983), *aff'd in part, rev'd in part on other grounds sub nom. Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985) 19
AT&T Technologies, Inc. v. *Communications Workers*, 106 S. Ct. 1415 (1986) 19
Andrews v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972) 8
Atchison, Topeka & Santa Fe Ry. v. *United Transportation Union*, 734 F.2d 317 (7th Cir. 1984) .. 9
Beers v. *Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983) 9
Boys Markets, Inc. v. *Retail Clerks Union*, 398 U.S. 235 (1970) 10, 20
Brotherhood of Locomotive Engineers v. *Louisville & Nashville R.R.*, 373 U.S. 33 (1963) 9
Brotherhood of Locomotive Engineers v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960) 19
Brotherhood of Railway and Steamship Clerks v. *Florida East Coast Ry.*, 384 U.S. 238 (1966) 15
Brotherhood of Railroad Trainmen v. *Chicago River & Indiana R.R.*, 353 U.S. 30 (1957) 6, 9, 20
Brotherhood of Railroad Trainmen v. *Toledo, Peoria & Western R.R.*, 321 U.S. 50 (1944) 24
Chicago & North Western Transportation Co. v. *United Transportation Union*, 656 F.2d 274 (7th Cir. 1981) 19
Denver & Rio Grande R.R. v. *Brotherhood of Railroad Trainmen*, 58 L.R.R.M. 2568 (D. Colo. 1965), *rev'd on other grounds*, 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967) 24
Elgin, Joliet & Eastern Ry. v. *Burley*, 325 U.S. 711 (1945) 6, 8, 9
Gateway Coal Co. v. *United Mine Workers*, 414 U.S. 368 (1974) 10, 20, 23
Independent Federation of Flight Attendants v. *Trans World Airlines*, 655 F.2d 155 (8th Cir. 1981) 19

TABLE OF AUTHORITIES—Continued

	Page
Johnson v. *Chicago Milwaukee & St. Paul R.R.*, 400 F.2d 968 (9th Cir. 1968)	15
543 (1964)	19
John Wiley & Sons, Inc. v. *Livingston*, 376 U.S.	
Minehart v. *Louisville and Nashville R.R.*, 731 F.2d 342 (6th Cir. 1984)	9
Missouri-Kansas-Texas R.R. v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298 (5th Cir. 1965)	6, 9
Missouri Pacific R.R. v. *United Transportation Union*, 782 F.2d 107 (8th Cir. 1986)	9
Montgomery Ward & Co. v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953)	24
New York, Chicago & St. Louis R.R. v. *Brotherhood of Locomotive Firemen & Enginemen*, 358 F.2d 464 (6th Cir. 1966)	9
Railway Labor Executives Ass'n. v. *Atchison, Topeka & Santa Fe Ry.*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971)	9
Southern Ry. v. *Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323 (D.C. Cir. 1967)	19
St. Louis Southwestern Ry. v. *United Transportation Union*, 646 F.2d 230 (5th Cir. 1981)	19
Texas & New Orleans R.R. v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930)	8, 14
Toledo Ann Arbor & Northern Michigan R.R. v. *Pennsylvania Co.*, 54 F. 730 (C.C.N.D. Ohio), *appeal dismissed sub nom. In re Lennon*, 150 U.S. 393 (1893)	24
Trans Int'l Airlines, Inc. v. *International Brotherhood of Teamsters*, 650 F.2d 949 (9th Cir.), *cert. denied sub nom. Air Line Pilots Ass'n* v. *Trans Int'l Airlines*, 449 U.S. 1110 (1980)	9, 20
United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)	19
United Transportation Union v. *Baker*, 482 F.2d 228 (6th Cir. 1973)	19

TABLE OF AUTHORITIES—Continued

	Page
United Transportation Union v. *Penn Central Transportation Co.*, 505 F.2d 542 (3d Cir. 1974)	19
Whirlpool Corp. v. *Marshall*, 445 U.S. 1 (1980)	11
Statutes:	
Federal Railway Safety Act, Pub. L. No. 91-458, 84 Stat. 971 (1970), as amended:	
Section 202, 45 U.S.C. § 431	11
Section 203, 45 U.S.C. § 432	11
Section 207, 45 U.S.C. § 436	11
Section 212, 45 U.S.C. § 441	*passim*
Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811 (1980)	6, 13, 14
Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), as amended:	
49 U.S.C. § 11101	15
Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947), as amended:	
Section 502, 29 U.S.C. § 143	10, 23
National Labor Relations Act, ch. 372, 49 Stat. 449 (1936), as amended:	
Section 2, 29 U.S.C. § 152	10
Section 7, 29 U.S.C. § 157	10
Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970), as amended:	
Section 11, 29 U.S.C. § 660	12
Railway Labor Act, ch. 347, 44 Stat. 577 (1926), as amended:	
Section 2, 45 U.S.C. § 151a	3, 8
Section 3 First, 45 U.S.C. § 153 First	*passim*
1 U.S.C. § 1	12
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	5
28 U.S.C. § 1337	5

TABLE OF AUTHORITIES—Continued

Legislative History: Page

Legislative History of the Railway Labor Act, As Amended (1926 through 1966) (United States Government Printing Office 1974) 15

H.R. Rep. No. 96-1025, 96th Cong., 2d Sess. (1980) 11, 14, 21

Railway Safety: Hearing before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce, 96th Cong., 2d Sess. (1980) 13, 14, 21, 22, 25

126 Cong. Rec. 26531, 27056 (1980) 11, 22

H.R. 6497, 96th Cong., 2d Sess. (1980) 13, 14, 21, 22, 25

Miscellaneous:

29 C.F.R. § 1977.12 (1979), currently at 29 C.F.R. § 1977.12 (1985) 11, 12

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R.M. LENFEST, JR., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Boston and Maine Corporation respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 799 F.2d 795 (1986) and is reprinted at App. 1a-18a. The opinion of the District Court granting the petitioner's motion for a preliminary injunction is reported at 622 F. Supp. 942 (D. Mass. 1985) and is reprinted at App. 19a-32a. The opinion of the District Court granting petitioner's motion for a temporary restraining order is unreported, and is reprinted at App. 33a-35a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1986 (App. 36a). The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Section 212 of the Federal Railroad Safety Act, as amended, 45 U.S.C. § 441, provides in pertinent part:

> **"(a) Filing of complaints; institution of proceedings; testimony**
>
> (1) A common carrier by railroad engaged in instate or foreign commerce may not discharge or in any manner discriminate against any employee because such employee, whether acting in his own behalf or in a representative capacity, has—
>
> (1) filed any complaint or instituted or caused to be instituted any proceding under or related to the enforcement of the Federal railroad safety laws; or
>
> (2) testified or is about to testify in any such proceeding.
>
> **(b) Refusal to work under hazardous conditions**
>
> (1) A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if—
>
> (A) the refusal is made in good faith and no reasonable alternative to such refusal is available to the employee;
>
> (B) the hazardous condition is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that—

(i) the condition presents an imminent danger of death or serious injury; and

(ii) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to the regular statutory channels; and

(C) the employee, where possible, has notified his employer of his apprehension of such hazardous condition and of his intention not to perform further work unless such condition is corrected immediately.

* * *

(c) Resolution of disputes

(1) Any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(2) In the case of any violation of subsection (a) or (b) of this section, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award backpay to the aggrieved employee and order such employee reinstated to his position."

2. Section 2 of the Railway Labor Act, 45 U.S.C. § 151a, provides in pertinent part:

"The purposes of the Chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

3. Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i), provides in pertinent part:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, and working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the [National Railroad] Adjustment Board with a full statement of the facts and all supporting data bearing upon the dispute."

STATEMENT OF THE CASE

This case arises out of a strike against petitioner Boston and Maine Corporation called by respondent Lenfest as the General Chairman of the United Transportation Union(T) General Committee of Adjustment on the Boston and Maine. (App. 20a). The United Transportation Union represents the Boston and Maine's trainmen and conductors for purposes of collective bargaining under the Railway Labor Act. (App. 19a). Boston and Maine is a common carrier of freight and passengers by rail that operates throughout New England and parts of New York, and that, at the time of the strike, also operated a commuter rail service in Boston, Massachusetts. (App. 19a-20a).

At 4:00 A.M. on November 4, 1985, without warning, members of the United Transportation Union carrying signs reading "UTU ON STRIKE" established picket lines throughout the Boston and Maine system, which caused a general work stoppage of the Boston and Maine's employees, so that its freight and passenger operations were entirely shut down. (App. 20a); Transcript of Hearing on Temporary Restraining Order at 36 (Nov. 4,

1985). The strike was halted that evening when the district court granted a temporary restraining order.[1] (App. 35a). In the meantime Boston and Maine lost a day's revenue and approximately 25,000 Boston area residents who relied upon the commuter rail service to travel to and from work were forced to find alternative means of transportation, or were unable to report to their jobs. (App. 20a).

Boston and Maine had received no prior notice of the strike. (App. 20a-22a). Boston and Maine officials who questioned picketers as to the reason for the strike were advised that it concerned "safety." (App. 21a). It was not, however, until the hearing on Boston and Maine's motion for a temporary restraining order on the evening of November 4 that Lenfest told the Boston and Maine that he had called the strike to protest the carrier's alleged departure from its practice of providing "flagging" at construction sites along the track to warn oncoming trains that the track might be obstructed. (App. 34a). Neither Lenfest nor any other United Transportation Union official or member had ever previously notified the Boston and Maine of any specific instance in which the carrier had failed to provide flagging at construction sites. (App. 21a-22a).

Under § 3 First (i) of the Railway Labor Act, all disputes "growing out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules or working conditions," are subject to mandatory arbitration by adjustment boards constituted under § 3. 45 U.S.C. § 153 First (i) (emphasis added). Such so-called "minor disputes" include not only claims arising under collective bargaining agreements, but also "omitted case[s]" involving claims that arise from "some incident of the employment relation" that is "independent

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[1] The district court's jurisdiction was based upon 28 U.S.C. §§ 1331 and 1337.

of those covered by the collective agreement." *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). Because a carrier's duty to provide a safe work place is an "incident of the employment relation," a claim that a carrier has failed to correct an allegedly hazardous condition presents a minor dispute. *Missouri-Kansas-Texas R.R.* v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298, 300 (5th Cir. 1965). A strike over a minor dispute is unlawful, and may be enjoined by a federal court notwithstanding the Norris-LaGuardia Act's general proscription of strike injunctions. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30 (1957).

In this case, however, respondents claimed for the first time in response to the Boston and Maine's motion for a preliminary injunction that their concerted work stoppage and picketing was not a strike over a minor dispute, but rather was a protected refusal to work under § 212 (b) of the Federal Railroad Safety Act.[2] Section 212(b) prohibits a rail carrier from discriminating against an employee who refuses in good faith to work under hazardous conditions that a reasonable person would believe present "an imminent danger of death or serious injury," provided that the employee has, where possible, first notified the carrier both of the hazard and of his intention not to perform work until the hazard is corrected. 45 U.S.C. § 441(b)(1)(A)-(C).

The district court preliminarily enjoined the strike, rejecting the respondents' defense under § 212(b). The court first determined that the dispute over the Boston and Maine's alleged failure to comply with its flagging policy was a minor dispute under the Railway Labor Act, so that the strike over that dispute was unlawful. (App. 26a-27a). The court then held that § 212(b) of the Federal Railroad Safety Act "was not intended to

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[2] § 10 of the Federal Railroad Safety Authorization Act of 1980 amended the Federal Railroad Safety Act by adding § 212. Pub. L. 96-423 § 10, 94 Stat. 1811, 1815 (1980).

provide a shield [for] illegal general strikes." (App. 30a). The court construed § 212(b) to "allow an employee or employees *personally* faced with a hazardous situation to walk off a job without the fear of retaliation of their employer," so long as the notice and other statutory requirements are met. "This is not to say," the court ruled, "that one man's danger affords any basis at all in law or in fact for a system-wide strike by hundreds of other employees who are not personally exposed to that danger." (App. 30a-31a) (emphasis in original). As an alternative ground, the court held that the strike would not be protected in any event because respondents had failed to comply with the notice requirements of § 212(b)(1)(c). (App. 29a-30a).

The Court of Appeals reversed on both grounds. It rejected the district court's "literal" construction of § 212(b), and held that "the Union may call a concerted work stoppage under [§ 212(b)] to protect the lives and safety of employees." (App. 7a, 9a). The established doctrine under the Railway Labor Act that strikes over minor disputes are unlawful no longer applies to safety strikes, in the view of the Court of Appeals, since the 1980 enactment that added § 212 to the Safety Act. (App. 13a).

The Court of Appeals also reversed the district court's holding that the strike was unprotected under § 212(b) because of respondents' failure to comply with the notice requirements of § 212(b)(1)(C). The court held that § 212(c), 45 U.S.C. § 441(c), which provides that disputes arising under § 212 shall be determined by adjustment boards constituted under § 3 of the Railway Labor Act, deprives the district courts of jurisdiction to make any findings of fact as to the statutory requirements for protection under § 212(b). (App. 10a-11a). The Court stated that this compelled the holding that the strike was "a protected refusal to work" under § 212(b). (App. 18a).

The Court of Appeals went on to hold that, despite its "protected" status, a strike called under § 212(b) can be enjoined once the underlying dispute has been committed to an adjustment board, in order to protect the board's jurisdiction. However, having held that a court may not make any factual determinations, including any assessment of the nature of the hazard alleged to be involved, the Court of Appeals held that to obtain a strike injunction in a § 212(b) case, a carrier must make some provision to meet the union's purported safety demands. (App. 15a-18a). In addition, because of its holding that § 212 (b) protects any strike over allegedly hazardous conditions, the Court of Appeals ordered that the Boston and Maine's action for damages for its strike losses be dismissed. (App. 18a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Creating A Novel Right of Railroad Unions To Call a General Strike Over an Alleged Safety Dispute Unjustifiably Undermines The Railway Labor Act's Fundamental Objective of Preventing Strikes

As this Court has long recognized, "the major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes." *Texas & New Orleans R.R.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930). See 45 U.S.C. § 151a (1). The Railway Labor Act thus provides "for the prompt and orderly settlement" of all labor disputes arising under it. 45 U.S.C. § 151a(4) & (5). The "prompt and orderly" mechanism provided for "minor disputes" growing "out of grievances or out of the interpretation or application of [collective bargaining] agreements" is compulsory arbitration by adjustment boards under § 3 of the Act. *Elgin, Joliet & Eastern Ry., supra*, 325 U.S. at 722-723; 45 U.S.C. § 153 First(i); see *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972). Strikes

over minor disputes are unlawful, since to allow them would nullify the mandatory jurisdiction of the adjustment boards. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30, 39-42 (1957).[3]

The category of minor disputes comprehends not only claims arising under collective bargaining agreements but also those claims that this Court denominated in *Elgin, Joliet & Eastern Ry.* as "omitted" cases, which, while independent of any agreement, nonetheless are "founded on some incident of the employment relation." 325 U.S. at 723.[4] As the district court in this case recognized, and as the Fifth Circuit held in *Missouri-Kansas-Texas R.R., supra*, although an employer's obligation to provide a safe work place may arise from the common or statutory law, and not from its collective bargaining agreements, that obligation is an incident of the employment relationship. Thus a claim by a railroad union that a carrier has failed to provide safe working conditions presents a minor dispute of the "omitted case" variant, and a strike over such a claim is unlawful. See 342 F.2d at 300. In short, because § 3 of the Railway Labor act bars strikes over minor disputes, the Act affords no right to unions or to

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[3] *E.g., Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 337, 39-40 (1963); *Missouri Pacific R.R.* v. *United Transp. Union*, 782 F.2d 107, 110 (8th Cir. 1986); *Atchison, Topeka & Santa Fe Ry.* v. *United Transp. Union*, 734 F.2d 317, 320 (7th Cir. 1984); *Trans Int'l Airlines Inc.* v. *International Bhd. of Teamsters*, 650 F.2d 949, 965-66 (9th Cir. 1980); *New York, Chicago & St. Louis R.R.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 358 F.2d 464, 469 (6th Cir. 1966).

[4] See *e.g., Minehart* v. *Louisville & Nashville R.R.*, 731 F.2d 342, 343 (6th Cir. 1984) (claim of retaliatory discharge held to present minor dispute); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425, 429 (9th Cir. 1983) (claim of intentional infliction of emotional distress held to present minor dispute); *Railway Labor Executives Ass'n* v. *Atchison, Topeka & Santa Fe Ry.* 430 F.2d 994, 997 (9th Cir. 1970) (claim that carrier's partial shutdown and elimination of jobs was a statutory tort under the Interstate Commerce Act held to present minor dispute).

employees to strike in protest against allegedly unsafe or otherwise unsatisfactory working conditions.[5]

Section 212 of the Federal Railroad Safety Act expressly incorporates § 3 of the Railway Labor Act, providing that employee grievances under § 212(b) must be heard by adjustment boards. 45 U.S.C. § 441(c). On its face, therefore, § 212 would appear to incorporate the well-settled law under § 3 and to ban strikes over safety disputes. The Court of Appeals, however, drew precisely

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[5] The same result obtains under the National Labor Relations Act when arbitration is provided. Under that Act, arbitration is a matter of contract, not a statutory obligation as it is under the Railway Labor Act. An arbitration provision in a labor contract, however, implies a no-strike obligation as a matter of law. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 382 (1974). Just as an unlawful strike over a minor dispute under the Railway Labor Act may be enjoined notwithstanding the Norris-LaGuardia Act, a strike that violates an express or implied no-strike obligation under the National Labor Relations Act may be enjoined. *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 248 (1970). In *Gateway Coal*, this Court held that the no-strike obligation derived from a contractual arbitration provision generally applies to safety disputes. 414 U.S. at 379.

To be sure, the Court in *Gateway Coal* recognized that § 502 of the Labor Management Relations Act, 29 U.S.C. § 143, which provides that refusals to work under abnormally hazardous conditions shall not be deemed unlawful strikes, authorizes unions to call work stoppages where there is objective evidence that such an abnormal hazard exists. The Court of Appeals in this case relied in part on this aspect of *Gateway Coal* to hold that a railroad union may call a strike under the Federal Railroad Safety Act. (App. 9a-10a). The Court of Appeals' reliance was misplaced, however, because § 502 of the Labor Management Relations Act amended, and is a part of the same statutory scheme as, the National Labor Relations Act, § 7 of which broadly authorizes "concerted activities for the purpose of collective bargaining or *other mutual aid or protection*." 29 U.S.C. § 157 (emphasis added). Neither § 502 nor § 7 applies to the railroad industry, 29 U.S.C. §§ 152(2) & (3), and neither the Federal Railroad Safety Act nor, for that matter, the Railway Labor Act, contains any broad authorization for concerted action analogous to § 7.

the opposite inference and construed § 212(b) to effect a major change in the law of railway labor relations, conferring upon railroad unions the right not only to call a general strike, but also to establish picket lines and cause a system-wide shut-down to protest an allegedly unsafe condition affecting the union's members. It is clear, however, that Congress never intended that the Federal Railroad Safety Act have any such effect.

The Federal Railroad Safety Act provides a detailed and comprehensive scheme for preventing and remedying railroad safety hazards. It is enforceable not only by the Secretary of Transportation and the State governments, but also by individual railroad employees. 45 U.S.C. §§ 431, 436(b), 432(e). Section 212(b) by its plain terms applies only where "there is insufficient time [for] resort to regular statutory channels" because an employee is confronted with a condition that presents "an imminent danger of death or serious injury." 45 U.S.C. §§ 441(b)(1)(B)(i). Even in such situations, a refusal to work is protected only if it is "in good faith," if a "reasonable person" would conclude that it is necessary, and if the employee gives prior notice to the carrier, unless that is impossible. 45 U.S.C. § 441(b)(1)(A), (B), & (C). As the legislative history of § 212(b) states, that provision applies only where railroad employees are presented with an absolute choice "between their lives and their livelihoods." H.R. Rep. No. 96-1025, 96th Cong., 2d Sess. at 8 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3830, 3832.[6] The language of § 212(b), its

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[6] The legislative history indicates that Congress intended by § 212(b) to extend to railroad employees the same right to refuse to work under hazardous conditions that this Court recognized employees in other industries possess under the Occupational Safety and Health Act in *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980). See H.R. Rep. No. 96-1025, *supra*, at 16; 126 Cong. Rec. 27056 (1980) (remarks of Sen. Cannon); *id.* at 26531 (remarks of Rep. Florio).

Whirlpool presented the question of the validity of a regulation of the Secretary of Labor under OSHA. The regulation, 29 C.F.R.

legislative history, and the comprehensive remedial scheme of which it is a part thus leave no room for doubt that the Act protects refusals to work only where they are necessary as a last resort to protect employees from immediate life-threatening danger.

In holding that § 212(b) authorizes strikes and picketing by railroad unions, the Court of Appeals relied primarily upon 1 U.S.C. § 1. That statute provides as a general rule of statutory construction that "words importing the singular include and apply to several persons * * *." The court thus held that the singular word "employee" in § 212(b) refers as well to "groups of employees." (App. 7a-8a). Regardless how correct that premise may be, it does not support the court's conclusion that § 212(b) was intended to do more than confer a "personal right" upon those employees who are actually confronted with imminent and deadly peril. (App. 7a). Indeed, the rule of necessity that conditions employee rights under § 212(b) compels rejection of that conclusion. Moreover, while it may be that in a given case a group of employees would be protected under § 212(b) for refusing to work if all of them were subjected to imminent danger—although the record in this case contains no indication that such a circumstance was present here—that would neither necessitate nor justify the union that represents those employees in calling a general strike to protest the hazard. Still less could it justify a union's

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§ 1977.12 (1979), construed the anti-retaliation provision of OSHA, 29 U.S.C. § 660(c), to protect an employee who refuses to work when " 'confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace.' " 445 U.S. at 4 n.3 (quoting 29 C.F.R. § 1977.12). The Court upheld the regulation, noting that it dealt only with "highly perilous and fast-moving situations" that "will probably not often occur." *Id.* at 17. The regulation explicitly noted, correctly as this Court held, that " 'as a general matter there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.' " *Id.* at 10 (quoting 29 C.F.R. § 1977.12).

shutting down a carrier's entire operation by setting up picket lines advertising the strike to the carrier's other employees, virtually all of whom can be expected to honor the picket lines and refuse to report to work, as happened in this case. Such disruptive concerted activity plainly cannot be justified by any standard of necessity. Moreover, the legislative history of the Federal Railroad Safety Authorization Act of 1980, which added § 212, affirmatively indicates that Congress did not intend to create a new right to strike for railroad unions.

As originally introduced in the House of Representatives, the provision of the 1980 Authorization Act that became § 212 would have allowed an employee who believed his working conditions to be unsafe to demand reassignment, and "either individually or in concert with other employees, to stop working" to enforce that demand. H.R. 6497 at 3-4, 96th Cong., 2d Sess. (1980). The railroad industry opposed this provision on the ground that it "would subvert the long established principles and provisions of the Railway Labor Act, which has been on the books since 1926, and which carefully delineates the circumstances in which a strike may occur." *Railroad Safety: Hearing Before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. at 104 (1980). [hereinafter "*House Hearings*"] (statement of William H. Dempsey, President, American Association of Railroads); see also *id.* at 69. Pointing out that the Railway Labor Act "doesn't permit strikes except after the most extraordinary exhaustion of circumstances," an industry representative objected that the "in concert" provision would "give each employee who is dissatisfied with safety conditions the right to back up his unsupported judgment with the block-buster weapon of a strike." *Id.* at 173, 104.

Similarly, the railroad industry opposed a proposed amendment that would have given "the authorized col-

lective bargaining representative of the craft or class of [a carrier's] employees adversely affected" by an alleged violation of the Act's safety standards standing to sue the carrier under the Act. H.R. 6497, *supra*, at 2. The industry objected that this provision would have a "corrosive impact on labor relations" because it would allow a union to use litigation over alleged safety violations "as a means of pressing its position in labor disputes," and would thereby "weaken the effectiveness of the procedures existing under the Railway Labor Act." *House Hearings* at 69, 102-103.

The Authorization Act as reported by the House Committee on Interstate and Foreign Commerce after it had heard these industry objections entirely omitted the authorization for employees to act "in concert with other employees." H.R. Rep. No. 96-1025, *supra*, at 4. The House Committee also deleted the provision giving unions standing to sue and replaced it with one giving standing to individual employees "who may be exposed to physical injury." *Id.* at 2. Both of these changes were carried over into the Authorization Act that was passed by Congress. 94 Stat. 1812, 1815. Thus, Congress took pains to avoid any language that would allow under the Federal Railroad Safety Act strikes or other concerted activity that would be unlawful under the Railway Labor Act. In sum, the Court of Appeals' holding that railroad unions are free to strike over allegedly hazardous working conditions is plainly not supported by § 212(b) of the Federal Railroad Safety Act, and indeed is contrary to the purposes of the Congress in that Act.

The decision below is also contrary to and subversive of the Railway Labor Act's fundamental objective of preventing strikes. See *Texas & New Orleans R.R.*, *supra*, 281 U.S. at 565. The importance of that objective can hardly be overstated. Congress deemed it essential to prevent railroad strikes because of the harm to interstate commerce and the public interest that may result

from a strike of even short duration.[7] Indeed, precisely to serve the public interest, railroads as common carriers under the Interstate Commerce Act have a statutory duty to maintain continued operations. 49 U.S.C. § 11101(a).[8] Congress has thus repeatedly stressed the importance of the federal policy against strikes in the railroad industry, and indeed, as we have shown, the legislative history of the Safety Act itself indicates that it was carefully crafted to avoid interfering with that policy. Review by this Court is warranted because the Court of Appeals' creation of a novel strike right threatens to undermine that important federal policy.

To be sure, despite its holding that a union has a "protected" right under § 212(b) to strike, and to do so without giving the carrier any prior notice of the alleged safety violation or of the strike even if that is possible, and its further holding that a carrier's claim for damages caused by the strike therefore must be dismissed, the Court of Appeals also held that the strike nonetheless could be enjoined if the jurisdiction of an adjustment board is invoked under § 212(c) and the injunction is conditioned upon the carrier's taking action to meet the union's as yet unproven allegations of safety infractions. This does not make any logical sense and, perhaps more importantly, it does not make any practical sense. The Court of Appeals in effect is saying, "strike first and

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[7] See, *e.g.*, *Legislative History of the Railway Labor Act* at 238 (remarks of Rep. Merritt):

> "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everyone knows that if that system should be paralyzed even for one week * * * [there] would be a national calamity."

[8] See *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238 (1966); *Johnson* v. *Chicago, Milwaukee & St. Paul R.R.*, 400 F.2d 968, 972 (9th Cir. 1968) (carrier was obliged to do "'everything in its power to carry out its absolute obligation,'" and hence was liable in damages to shipper for termination of service caused by tunnel cave-in) (citations omitted).

only after the time necessary for the carrier to seek and obtain an injunction need the statutory remedy be pursued." It encourages the unions to strike with impunity for a time, and thus inflict economic damage on carriers, even though such a strike may be enjoined and thus cannot itself be expected to coerce a settlement of the safety dispute and even though the union's safety claims may be without foundation.

A strike that shuts down a railroad's operations for even a day may be very costly to the railroad and to the public. In this case, for example, the Boston & Maine lost a day's revenue from its freight operations and the fares that it would have gained from the more than 25,000 passengers who, but for the strike, would have used the carrier's commuter services to travel to and from work on November 4, 1985. (App. 20a). Shippers were deprived of rail service for that day, the commuters lost part or all of that day's work depending upon their ability without notice to arrange alternative means of transportation, and their employers were concomitantly deprived of their services. And the carrier's employees, most of whom are not represented by the United Transportation Union, lost a day's work and a day's pay. (App. 34a).

On the other hand, it is undisputed that an employee who has a good faith and reasonable belief that he is in imminent danger of death or serious injury from a hazardous condition which time does not permit to be eliminated through regular statutory channels has a right to refuse to work without even first notifying the employer, if prior notice is not possible, without being discharged or otherwise discriminated against by his employer. That is what the statute provides, and that is what the Congress considered to be sufficient, in light of the other statutory remedies provided to allow an employee to protect himself from unsafe working conditions.[9] The extrapola-

[9] The court below suggested that a right to strike was necessary because "an individual employee working on a train was not in a

tion by the court below of a protected right to strike is not in the statute, was not intended by the Congress, is not necessary, and gives rise to an important issue of law that should be reviewed by this Court.

II. The Decision Below Conflicts With Decisions of This and Other Courts on Judicial Enforcement of Labor Arbitration Provisions and Threatens to Disrupt Labor Relations in the Railroad Industry

Even if the decision of the Court of Appeals that the Federal Railroad Safety Act authorizes railroad unions to strike and picket over allegedly hazardous conditions were entirely correct, its determination that the grievance arbitration provision of the Act deprives federal courts of jurisdiction to determine whether such strikes meet the statutory requirements for protection is in conflict with numerous decisions of this and other federal courts on the role of the courts in enforcing labor arbitration provisions, and its consequences are sufficiently important to warrant review by this Court.

Section 212(c)(1) of the Act provides that any "dispute, grievance, or claim arising under this section" shall be determined by adjustment boards "in accordance with

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position to know about the risk until it was too late or the danger has passed," and "[o]nly the Union officials who were privy to the system-wide defective and inconsistent flagging protection were in a position to recognize the potential danger to which all employees working on trains were exposed." (App. 9a). It was not established in the record either that there was "system-wide defective and inconsistent flagging protection" (which the B&M denied) or that, if so, train crews generally would not know about it. But even if both propositions were established, in the time that the union was directing the employees to strike and picket (including the time it took to prepare picket signs), the union could have advised them of the facts upon which it based its flagging claim, and of the individuals' rights under the Safety Act. Moreover, the picketing was directed towards non-operating employees represented by other unions who under no circumstances could have been endangered by the allegedly defective flagging.

the procedures set forth in" § 3 of the Railway Labor Act. 45 U.S.C. § 441(c)(1). The Court of Appeals construed § 212(c)(1) to deprive the federal courts of jurisdiction to make any findings of fact in a case where the applicability of § 212(b) is asserted. (App. 11a). The Court of Appeals accordingly held that the courts lack power to determine whether a strike ostensibly called under § 212(b) has met the notice requirements of § 212(b)(1)(C), or any of the other statutory conditions precedent for protection, including the existence of an actual hazardous condition. *Id.* Thus, in the view of the Court of Appeals, a union's *bare assertion* that a strike is called over a safety issue compels the holding that the strike is "a protected refusal to work" under § 212(b), without regard to whether or not the statutory prerequisites for such protection have in fact been met. (App. 18a). Consequently, it ordered that the carrier's action for damages in this case be dismissed. *Id.* In addition, while the court held that even a protected refusal to work may be enjoined once any associated "claims" under § 212(b) have been submitted to an adjustment board, its view that the courts are obliged to take a striking union at its word in asserting a safety concern led it to hold that any strike injunction must be conditioned upon the carrier's taking some action to meet that alleged concern. (App. 17a).

The premise of the Court of Appeals' jurisdictional holding is that a court must defer totally to a party's claim that its actions are shielded from judicial scrutiny by an arbitration provision. That premise is in conflict with the whole body of case law under § 3 of the Railway Labor Act, which § 212(c) incorporates. All of the courts of appeals that have considered the question are in accord that federal courts have jurisdiction under § 3 to determine whether a dispute is arbitrable, and to reject a claim of arbitrability where the substantive position of the party asserting that claim is "obviously insubstan-

tial."[10] See *Southern Ry.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967) (claim of arbitrability under § 3 rejected where it was "so obviously insubstantial and so inherently unreasonable as to amount to bad faith"). Indeed, even where it is clear that a dispute is subject to arbitration under § 3, a federal court has jurisdiction to inquire into the facts to the extent necessary to determine whether a status quo injunction should issue pending the adjustment board's determination. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960). Moreover, decisions of this Court under the National Labor Relations Act likewise have repeatedly held that "the question of arbitrability * * * is undeniably an issue for judicial determination." *AT&T Technologies, Inc.* v. *Communications Workers*, 106 S. Ct. 1415, 1418 (1986). See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-47 (1964); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574-582 (1960).

It is critical that the federal courts have power to determine whether a dispute is arbitrable, because that question determines whether a union may strike over the dispute. Under the National Labor Relations Act, where arbitration is a matter of contract, "the agreement to

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[10] Thus, while the courts lack jurisdiction to interpret labor agreements, they may decide the merits of any case where it is apparent that no *bona fide* contract issue is presented because the position of the party relying on the agreement is frivolous or not even arguable. See, *e.g.*, *Air Line Pilots Ass'n* v. *Trans World Airlines*, 713 F.2d 940, 948 (2d Cir. 1983), *aff'd in part, rev'd in part on other grounds sub nom. Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985); *St. Louis S.W. Ry.* v. *United Transp. Union*, 646 F.2d 230, 233 (5th Cir. 1981); *Chicago & N.W. Transp. Co.* v. *United Transp. Union*, 656 F.2d 274, 278 (7th Cir. 1981); *Independent Federation of Flight Attendants* v. *Trans World Airlines*, 655 F.2d 155, 159 (8th Cir. 1981); *United Transp. Union* v. *Penn Central Transp. Co.*, 505 F.2d 542, 544 & n.5 (3d Cir. 1974) (*per curiam*); *United Transp. Union* v. *Baker*, 482 F.2d 228, 230 (6th Cir. 1973).

arbitrate and the duty not to strike [are] construed as having coterminous application." *Gateway Coal, supra,* 414 U.S. at 382; see *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 248 (1970). The same balance is effected by the Railway Labor Act, where the statute itself effects the exchange of the unions' right to strike over minor disputes for the carriers' duty to arbitrate those disputes. *Chicago River & Indiana R.R., supra,* 353 U.S. at 37.[11]

Thus, if strikes may indeed be protected under § 212 (b), at a minimum § 212(c) should be construed to incorporate the ordinary rule that applies under § 3, and reject a union's claim that its strike is justified by § 212 (b) where that claim is obviously insubstantial or frivolous. The decision of the Court of Appeals in this case instead construes § 212(c) of the Safety Act to turn the well-settled understanding of the role of the courts in determining the arbitrability of labor disputes on its head, by depriving courts of jurisdiction in any Railway Labor Act case involving a safety dispute to determine whether the dispute is arbitrable, and hence whether the strike is unlawful. Section 212 and its legislative history indicate that Congress could not have intended § 212(c) to have that effect.

Further, the Act and its legislative history indicate that § 212(c) was not intended to apply to a carrier's claim that a strike is unprotected under the Act, if in fact Congress intended that the Act could protect strikes. Section 212(c) on its face is inapplicable to carrier claims. It applies only to claims arising under § 212(a) or § 212(b). The only conduct that §§ 212(a) and 212 (b) prohibit in terms is carrier discrimination against or discharge of employees who exercise rights protected by the Act. 45 U.S.C. §§ 441(a), (b). Thus, the refer-

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[11] See also *Trans Int'l Airlines, supra,* 650 F.2d at 966 ("The minor dispute arbitration procedure was designed as a substitute for prearbitration strikes * * *.").

ence in § 212(c)(1) to "[a]ny dispute, grievance, or claim arising under this section" refers only to employee claims of unlawful discrimination or discharge. This reading is corroborated by § 212(c)(2), which defines the remedial powers of adjustment boards under the Act, and states that "in the case of any violation of subsection (a) or (b) of this section, the Adjustment Board * * * shall, where appropriate, award backpay to *the aggrieved employee* and order *such employee* reinstated to his position." 45 U.S.C. § 441(c)(2) (emphasis added). There is no corresponding remedy for an employer subjected to huge losses by a strike the safety justification of which turns out to have been asserted in bad faith, or that otherwise fails to meet the conditions that § 212(b)(1) imposes. Nor is there any mechanism by which the adjustment board may prevent the harm to a carrier's shippers and passengers that such a strike would inflict.

The legislative history of § 212(c) confirms that it was intended to apply only to employee claims. As originally introduced in the House of Representatives, § 212(c) provided that "[t]he district courts of the United States shall have original jurisdiction over any civil action based on a dispute, grievance, or claim arising under this section." H.R. 6497, *supra*, at 4. The railroad industry objected to this provision because under the Railway Labor Act, a claim that a carrier has discriminated against an employee for refusing to work under unsafe conditions has traditionally been regarded as a minor dispute that must be heard by an adjustment board under § 3 of the Act. *House Hearings*, *supra*, at 106. The House Committee accordingly dropped the provision for district court jurisdiction, and instead provided that grievances under the Act should be submitted to adjustment boards, to ensure that the employee protections provided by § 212 would "be enforced solely through the existing grievance procedures provided for in Section 3 of the Railway Labor Act." H.R. Rep. No. 96-1025, *supra*,

at 8. Similarly, the Senate Committee recognized that "under current law rail employees * * * can seek * * * protection through normal grievance procedures established under Section 3 of the Railway Labor Act." 126 Cong. Rec. at 27056. Thus, as Senator Cannon stated, § 212(c) was intended merely to "codify the protection granted pursuant to these procedures by the [adjustment] boards." *Id.* It was not intended to apply to a carrier's claim that a strike called under § 212(b) fails to meet the statutory conditions for protection.

The legislative history of § 212(b) also negatives any inference that Congress could have intended the Federal Railroad Safety Act both to protect strikes that meet the statutory conditions for protection, and at the same time to deprive the courts of jurisdiction to enforce those conditions. The version of § 212(b) that was originally introduced in the House would have protected any railroad employee for refusing to work in conditions that he "reasonably believes present an imminent danger to his safety and health." H.R. 6497, *supra*, at 3. The House Committee changed the proposed legislation in response to objections from the railroad industry. The industry objected to the standard of "imminent danger * * * to safety and health," characterizing it as "a net cast so broadly" that it would authorize employees "to interrupt railroad operations in a very, very serious way" over problems as trivial as bad weather, even though railroads as common carriers have a duty to operate "in all kinds of weather." *House Hearings, supra*, at 70; see also *id.* at 104, 173. To remedy this problem, Congressman Matsui suggested adoption of a "more stringent" standard requiring that "a real danger of death or serious injury must exist * * * before the employee has a right to leave." *Id.* at 194. The House Committee responded by recommending the requirements of "good faith," the lack of a "reasonable alternative," the risk of "imminent danger of death or serious injury," and prior notice to the

carrier, all of which Congress adopted in § 221(b)(1). 45 U.S.C. § 441(b)(1). These provisions afford no protection whatever from disruptive strikes called without any good faith justification, unless good faith and the other statutory requirements can be determined by the courts, since adjustment boards have no power under the Act to provide any remedy to carriers or the public.

Congress intended the § 212(b)(1) requirements to prevent the harm that might result to a carrier's operations if even a few employees unjustifiably refused to perform their jobs, as the legislative history just discussed indicates. A general strike and picketing by an entire craft of employees obviously presents a far more serious harm, since it may well shut the carrier down entirely, as the strike in this case did. The Court of Appeals' holding that the federal courts lack jurisdiction to determine that a strike ostensibly justified by the Act is in fact unprotected is contrary to the unambiguous intention of Congress, evinced in the legislative history, to protect carriers from unnecessary interruptions of their operations.[12]

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[12] The decision below is also irreconcilable with the decision of this Court in *Gateway Coal, supra.* In *Gateway Coal,* the Court construed § 502 of the Labor Management Relations Act, which provides that the refusal of an employee or employees to work under "abnormally dangerous conditions" may not be deemed an unlawful strike, but, in contrast to § 212 of the Safety Act, contains no explicit standards defining the circumstances in which refusal to work may be justified. Compare 45 U.S.C. § 441(b) with 29 U.S.C. § 143. This Court, however, held that under § 502 a mere "honest belief" of danger was insufficient to excuse an unlawful strike over an arbitrable safety dispute:

> "Absent the most explicit statutory command we are unwilling to conclude that Congress intended the public policy favoring * * * peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be." 414 U.S. at 386.

The decision of the Court of Appeals in this case does precisely what this Court refused to do in *Gateway Coal.* Under the decision

The practical effect of the decision below is to give unions the power to inflict economic damage upon a carrier, for which there can be no remedy, even where no *bona fide* safety issues apply. The Court of Appeals held that the carrier's action for damages must be dismissed because the entire controversy over a Federal Railroad Safety Act strike must be resolved by an adjustment board. (App. 18a). Adjustment boards have no power under the Safety Act to grant damages to a carrier: their remedial powers apply only to violations of the Act by carriers. See 45 U.S.C. § 441(c)(2).[13] Moreover, under the decision below, any strike injunction granted under § 212 must be conditioned upon the carrier's taking some action to meet the union's demands, upon the mere asser-

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of the Court of Appeals, a railroad union's mere assertion that a strike is protected by the Federal Railroad Safety Act defeats the jurisdiction of any federal court to determine whether the strike is lawful. The decision below thus necessarily allows the public policy in favor of peaceful dispute resolution and against strikes, which is even stronger under the Railway Labor Act than under the National Labor Relations Act, to be "circumvented" and set at naught by "subjective judgment" of the union, whether honest or not. No "explicit statutory command" justifies the decision below. To the contrary, the Federal Railroad Safety Act explicitly commands that no refusal by a railroad employee to work may be justified on the basis of a subjective belief that his working conditions are unsafe. See 45 U.S.C. § 441(b).

[13] Similarly, under § 3 of the Railway Labor Act, there is no provision for them to award damages to carriers. See 45 U.S.C. § 153 First(o). The federal courts, by contrast, have the power to award damages to carriers for unlawful strikes. See, *e.g.*, *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western R.R.*, 321 U.S. 50, 63 (1944); *Denver & Rio Grande R.R.* v. *Brotherhood of Railroad Trainmen*, 58 L.R.R.M. 2568 (D. Colo. 1965); *rev'd on other grounds*, 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967); *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475, 500 (D. Ore. 1953); *Toledo Ann Arbor & Northern Michigan R.R.* v. *Pennsylvania Co.*, 54 F. 730, 740 (C.C.N.D. Ohio) (Taft, J.), *appeal dismissed sub nom. In re Lennon*, 150 U.S. 393 (1893).

tion that a safety hazard exists. (App. 17a). This too may well impose substantial and unrecoverable costs upon the carrier.

The economic weapon created by the decision below could be abused by unions to enforce their demands in labor disputes unrelated to safety, much like the proposed amendment to the Federal Railroad Safety Act that would have allowed unions to sue carriers for alleged safety infractions. See H.R. 6497, *supra*. Congress wisely rejected that provision after it was warned of the "corrosive impact" it would have on labor relations in the railroad industry. *House Hearings*, *supra*, at 69. The decision below threatens precisely the destabilizing effect on railroad labor relations that Congress was at pains to avoid.

In sum, the decision below patently invites railroad strikes, by holding not only that they may be protected under the Federal Railroad Safety Act, but also that courts are powerless to grant any remedy to carriers damaged by strikes that are not so protected. It grants to railway labor a potent one-sided weapon that, if unchecked, will undermine the effectiveness of the Railway Labor Act's orderly and balanced procedures for resolving labor disputes. It eviscerates the carefully-crafted protections Congress wrote into the Safety Act to prevent just such a result. Review by this Court is thus warranted to ensure that the "corrosive impact" threatened by the decision below is not permitted to befall the labor relations of this vital national industry.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: December 1, 1986

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1039

BOSTON AND MAINE CORPORATION,
Petitioner, Appellee,

v.

R.M. LENFEST, JR., INDIVIDUALLY AND AS CHAIRMAN OF THE GENERAL COMMITTEE OF ADJUSTMENT, UNITED TRANSPORTATION UNION (*T*), *et al.*,
Respondents, Appellants.

Appeal from the United States District Court
for the District of Massachusetts
[Hon. Andrew A. Caffey, *U.S. District Judge*]

Before

Coffin and Bowes, *Circuit Judges*,
and Maletz,* *Senior Judge*

John G. DiPersia with whom *George J. Cahill, Jr.* and *Cahill, Goetsch & DiPersia, P.C.* were on brief for appellants.

Kinga M. LaChapelle with whom *John E. O'Keefe* was on brief for appellee.

September 2, 1986

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* Of the United States Court of International Trade, sitting by designation.

BOWNES, *Circuit Judge.* Respondents-appellants, the General Committee of Adjustment of the United Transportation Union (the General Committee) and its individual officers and local chairmen, appeal an order of the district court preliminarily enjoining them from "engaging in a general strike or refusing to work" over alleged hazardous conditions on the railroad of petitioner-appellee Boston and Maine Corporation (B&M). Appellants claim that a work stoppage on November 4, 1985, which halted freight operations and left 25,000 commuters without service to Boston, was a valid refusal to work under hazardous conditions pursuant to § 10(b) of the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 441(b) (1982). Appellants assert that a work stoppage by all United Transportation Union (UTU) conductors and trainmen was called because the conductors and trainmen were faced with a system-wide, life-threatening danger due to the B&M's failure to provide consistent flagging protection at construction sites along the railroad tracks.

The district court held that the work stoppage was not a protected FRSA § 10 refusal to work, but was a strike over a "minor dispute" under the Railway Labor Act (RLA), 45 U.S.C. § 153 (1982), and was properly enjoinable upon B&M's showing of irreparable harm. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 42 (1957). The court held alternatively that even if the safety dispute was covered by § 10 of the FRSA, appellants had failed to comply with its notice provision and therefore the strike was not protected by it. *Boston and Maine Corp.* v. *Lenfest*, 622 F. Supp. 942, 948 (D. Mass. 1985). Appellants argue: (1) that the district court order should be overturned because the work stoppage was a § 10 refusal to work; (2) that the question of compliance with the statute should not have been decided by the district court, but by the National Railroad Adjustment Board pur-

suant to § 10(c) of the FRSA, 45 U.S.C. § 441(c)(1), which makes any "dispute, grievance or claim" subject to resolution under the procedures set forth in 45 U.S.C. § 153; and (3) that § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1982), deprives the court of jurisdiction to enjoin a § 10 work stoppage. As far as we can tell, this is a case of first impression.

Background

The heart of this case is a dispute over the adequacy of flagging signals along the railroad tracks of the B&M. The B&M freight operations in six Northeastern states, and passenger operations in three. At any given time private contractors are engaged in repair and maintenance work at several places along the line, and the locations shift day to day, even hour by hour. Flagging crews are assigned by the B&M to the construction sites so as to warn approaching trains and avert accidents between trains and construction machinery along the tracks. The B&M's policy is that no construction should proceed unless flagging is provided.

According to appellants, the safety issue arose when the General Committee Chairman, R.M. Lenfest, Jr. (Lenfest), began receiving "numerous" complaints in the months prior to November 1985 that train crews were passing construction sites where there was no flagging protection. The lack of flagmen followed no particular pattern, and sometimes a particular site would have flagmen one day and none the next. Lenfest claims to have repeatedly expressed his concern over the danger involved to Roger Audette, B&M's official in charge of assigning flagging crews. On November 3, 1985, Lenfest met with the local General Committee chairmen, and discussed the flagging situation. He testified that "it became obvious that any further discussion was an exercise in futility," and he was concerned that "to do nothing would be to invite disaster." He stated that he decided to act to pro-

tect the Union members. Lenfest called a work stoppage over the hazardous conditions, and beginning at 4:00 A.M. on November 4, the Union conductors and trainmen set up picket lines. Freight and commuter operations were disrupted by the work stoppage, and B&M sought a temporary restraining order in federal district court. After a hearing on November 4, the afternoon of the work stoppage, a temporary restraining order was entered by Judge Murray against the Union. B&M then filed a civil complaint seeking damages and a motion for a preliminary injunction. After a further hearing on November 14, Chief Judge Caffrey granted B&M's motion for a preliminary injunction in a memorandum and order issued on November 27.

Application of § 10 of the FRSA to This Dispute

Section 10 of the FRSA states in pertinent part as follows:

> Protection and rights of employees
>
> (a) Filing of complaints; institution of proceedings; testimony
>
> A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee because such employee, whether acting in his own behalf or in a representative capacity, has—
>
> (1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or
>
> (2) testified or is about to testify in any such proceeding.
>
> (b) Refusal to work under hazardous conditions
>
> (1) A common carrier by railroad engaged in interstate or foreign commerce may not discharge

or in any manner discriminate against any employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if—

(A) the refusal is made in good faith and no reasonable alternative to such refusal is available to the employee;

(B) the hazardous condition is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that—

(i) the condition presents an imminent danger of death or serious injury; and

(ii) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory channels; and

(C) the employee, where possible, has notified his employer of his apprehension of such hazardous condition and of his intention not to perform further work unless such condition is corrected immediately.

(2) The provision of this subsection shall not apply to security personnel employed by a railroad to protect persons and property transported by such railroad.

(c) Resolution of disputes

(1) Any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(2) In the case of any violation of subsection (a) or (b) of this section, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award backpay to the ag-

> grieved employee and order such employee reinstated to his position.

45 U.S.C. § 441.

The first issue is whether this was really a refusal to work under hazardous conditions. Appellees contend that "[b]ased on the evidence the court in effect found that the reason for the work stoppage was not the existence of a hazardous condition as claimed by respondents," and that therefore we cannot find that this was a § 10(b) work stoppage unless the district court was clearly erroneous. There is no such explicit or implicit finding in the district court opinion. The only reason given by appellants for the work stoppage was that it was called because of the danger posed by inconsistent flagging. Nor do appellees allege any other reason for the work stoppage.[1] In ruling that the work stoppage was a Railway Labor Act "minor" dispute, the district court expressly treated it as a strike over safety, referring to "the dispute over the B&M's alleged failure to provide flagging in this case" and to "a legal right to safe working conditions." *Boston & Maine Corp.* v. *Lenfest*, 622 F. Supp. at 946. The court also relied on *Missouri-Kansas-Texas Railroad Co.* v. *Brotherhood Railroad Trainmen*, 342 F.2d 298 (5th Cir. 1965), which involved a concerted refusal to work under hazardous conditions. *Boston and Maine Corp.* v. *Lenfest*, 622 F. Supp. at 946.

The next issue is whether § 10 applies to a collective refusal to work under hazardous conditions called by an employee bargaining unit, or whether it creates a right that can be exercised only by an employee acting individ-

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[1] Approximately six months earlier, on May 3, 1985, the Union had filed a Railway Labor Act § 6 notice, 45 U.S.C. § 156 (1982), seeking to revise its collective bargaining agreement with the B&M to provide that only United Transportation Union members be assigned as flagman, but it has not been suggested to us that the safety issue and the work stoppage that are the subject of this appeal are part of that § 6 dispute.

ually. The district court held that § 10 creates a right to refuse to work under hazardous conditions that can be exercised only individually, when an employee is personally faced with danger. The district court's holding was based on the literal terms of the statute. In urging affirmance appellees also point to the language of § 10(b), arguing that since it refers to "employees" and not to "employees" or "employee representative," it confers only a personal right.

Appellants make two valid arguments for rejecting a literal reading of the statute. First, they argue that whether or not the statute refers to employee or employees is irrelevant because 1 U.S.C. § 1 (1982), which governs the construction of federal statutes, states in pertinent part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> —words importing the singular include and apply to several persons, parties, or things.

Appellants' second argument is that even though the statute is silent as to union representatives, this court must interpret it based on the "practical realities of railroading" and the nature of the danger involved. Because the inconsistent flagging could result in a train not being warned of construction at any point in the B&M system, every conductor and trainman was put at risk. But since many of the train crews had not yet encountered an unflagged construction site, they could not be expected to know the extent of the danger they faced. It was only the General Committee, which had gathered flagging information from B&M's entire operations, that understood the nature and extent of the system-wide danger posed by inconsistent application of the railroad's flagging policy.[2]

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[2] Appellants also advanced a third argument based on an alleged connection between the FRSA and OSHA. We see no need to discuss this argument.

First, we find that since the context of § 10 does not confine the word "employee" to the singular it applies to groups of employees as well as an individual employee. 1 U.S.C. § 1.

Second, we recognize that "a statute's plain language is the primary indicator of its meaning," *Massachusetts Financial Services, Inc.* v. *Securities Investor Protection Corp.*, 545 F.2d 754, 756 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977), but in light of the stated purpose and design of § 10 its language is not so "plain" as to control, without more, the precise question posed by the facts of this case. *See United States* v. *Mariea*, No. 85-1770, slip op. at 8-9 (1st Cir. June 27, 1986); *cf. Landreth Timber Co.* v. *Landreth*, 105 S. Ct. 2297, 2301 (1985) (starting point in statutory construction is language of statute); *Blum* v. *Stenson*, 465 U.S. 886, 896 (1984) (where resolution of question of federal law turns on statute and intention of Congress, Court looks first to statutory language and then to legislative history if statutory language is unclear); *Bob Jones University* v. *United States*, 461 U.S. 574, 586 (1983) ("a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute"). Congress expressed its purpose starkly and succinctly: "The Committee strongly believes employees should not be forced to choose between their lives and their livelihoods." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3830, 3832. And the Supreme Court has instructed that "safety legislation is to be liberally construed to effectuate the congressional purpose." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980) (citing cases). We therefore construe the statute taking its purpose and legislative history as well as its words into consideration.

The main purpose of the statute is to allow employees faced with the risk of death or serious injury to refuse to work without fear of retaliatory firing by the em-

ployer. On its face, § 10 apparently assumes that an employee will be in a position to recognize the risk. Here, however, an individual employee working on a train was not in a position to know about the risk until it was too late or the danger has passed. Only the Union officials who were privy to the system-wide defective and inconsistent flagging protection were in a position to recognize the potential danger to which all employees working on trains were exposed. To hold that union leaders can call for a concerted work stoppage in such circumstances only at the risk of being found liable for instigating an illegal strike is to place them in the position of having to choose between their own welfare and the lives of the employees. This is contrary to what Congress intended. We hold that where hazardous working conditions are the result of a system-wide failure to provide adequate protection so that employees are in danger of death or serious injury without knowing it, and the Union is aware of such danger, the Union may call a concerted work stoppage under § 10(b) to protect the lives and safety of the employees.

We find further support for our holding in the Supreme Court's reading of an analogous labor statute, § 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (1982). Section 502 provides in part that

> the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this chapter.

The court interpreted this language, which like § 10(b) is silent on the role of unions, to include a right to a work stoppage called by a union. The Court stated in an eight-member majority:

> We agree . . . that a work stoppage called solely to protect employees from immediate danger is authorized by § 502 and cannot be the basis for either a

> damages award [for breach of a contractual no-strike agreement] or a *Boys Markets* injunction [to enjoin a strike and order arbitration where arbitration is provided for in the collective bargaining agreement].

Gateway Coal Co. v. *United Mine Workers of America*, 414 U.S. 368, 385 (1974). Additional support is also found in a case where the majority of a panel of the Sixth Circuit rejected a conclusion by one judge, similar to that of the district court in this case, that § 502 is "addressed solely to the rights of individuals" because it "does not mention a labor union." *Clark Engineering & Construction Co.* v. *United Brotherhood of Carpenters and Joiners of America*, 510 F.2d 1075, 1079 (6th Cir. 1975) (Weick, J.). Relying on *Gateway*, two judges on the panel agreed that under § 502 it is not an impermissible secondary boycott for a union to protest hazardous job conditions by picketing at a work entrance used by nonunion workers. *Id.* at 1084 (McCree, J., concurring; Edwards, J., dissenting).

The next issue is jurisdictional. The district court found that "[e]ven if the statute [§ 10(b)] did apply to this case, respondents failed to comply with the requirement of subsection (b)(1)(C) to notify the B&M of any specific hazardous conditions existing on the railroad and of their intention not to perform further work unless such condition is corrected immediately." *Boston and Maine Corp.* v. *Lenfest*, 622 F. Supp. at 948. The question is whether the district court had jurisdiction to make this finding.

Section 10(c) of the FRSA states plainly that "[*a*]*ny* dispute, grievance, or claim arising under this section *shall be* subject to resolution in accordance with the procedures set forth in section 153 of this title." 45 U.S.C. § 441(c) (emphasis added). It does not state "any valid dispute," or "any dispute for which the conditions of this section are met." Section 153 (45 U.S.C. § 153) provides for the settlement of railroad Labor disputes by the Na-

tional Railroad Adjustment Board. The House Report that accompanied the FRSA is clear, "[t]he Committee intends this to be the exclusive means for enforcing this section." H.R. Rep. No. 1025, 1980 U.S. Code Cong. & Ad. News at 3841. If the applicability of Section 10 of the FRSA depended on the findings of fact made by a district court, this would render the § 10(c) requirement meaningless. The Board would have to follow the district court's findings of fact and could do nothing but determine a remedy. Such a bifurcated resolution of disputes over hazardous working conditions would vitiate a provision designed to provide speedy and final nonjudicial resolution. Accordingly, we find that the district court was without jurisdiction to make findings of fact in this case as to the adequacy of notice given to the B&M. This entire dispute, including the nature of the hazard faced, whether the Committee complied with the statutory requirements of notice, and the retaliatory actions of the B&M in firing the leaders of the work stoppage and disciplining others, must be submitted to the National Railroad Adjustment Board under 45 U.S.C. § 153.

Availability of Injunctive Relief

Section 4 of the Norris-LaGuardia Act deprives federal courts of "jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute." 29 U.S.C. § 104.[3] Despite the broad, explicit language of the Act

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[3] The provision states more fully:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work . . .
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

29 U.S.C. § 104.

the Supreme Court has construed two major statutes to grant implicitly to federal courts jurisdiction to issue labor injunctions.

In *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U.S. at 42, the Court held that there is jurisdiction to issue injunctive relief where the RLA applies to a dispute and provides the process for resolving it. Consequently, during either a § 3 (45 U.S.C. § 153) "minor" dispute[4] or a § 6 (45 U.S.C. § 156) "major" dispute[5] resolution proceeding under the RLA, a district court may enjoin a strike and prevent either party from altering the status quo during the pendency of the proceedings. *Carbone* v. *Meserve*, 645 F.2d 96, 98 (1st Cir.), *cert. denied*, 454 U.S. 859 (1981). If the § 6 nonbinding procedures for a major dispute are exhausted without resolution, then under the Norris-LaGuardia Act the district court no longer has jurisdiction to continue to enjoin the strike or employer retalia-

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[4] A "minor" dispute is one which

> contemplates the existence of a collective agreement already concluded or . . . a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one . . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Elgin, Joliet & Eastern Railway Co. v. *Burley*, 325 U.S. 711, 723 (1945).

[5] A "major" dispute

> relates to disputes over the formation of collective agreements or efforts to secure them. They arise when there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

Elgin, Joliet & Eastern Railway Co. v. *Burley*, 325 U.S. at 723.

tion. *Missouri-Kansas-Texas Railroad Co.* v. *Brotherhood of Railroad Trainmen*, 342 F.2d at 299. Since resolution of a minor dispute is by binding arbitration, however, an injunction effectively ends all prospects of a strike. *Carbone* v. *Meserve*, 645 F.2d at 98.

In *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 253 (1970), the Supreme Court held that there is jurisdiction to issue injunctive relief where a labor dispute is covered by an agreement to arbitrate governed by § 301 of the Labor Management Relations Act.[6] In such a case the district court may issue an injunction "under ordinary principles of equity" pending arbitration of the dispute according to the agreement. *Id.* at 254.

In this case the district court asserted jurisdiction to enjoin the appellants' work stoppage because it held the dispute at issue was a minor dispute under the RLA. The district court relied on the case of *Missouri-Kansas-Texas Railroad Co.* v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298, in finding this to be a minor dispute. Although the *M-K-T Railroad* case did hold squarely that a union-wide walkout over safety was a "minor" dispute and therefore enjoinable, it was decided some fifteen years before the enactment of the FRSA. If a work stoppage is a protected refusal to work because of hazardous conditions under § 10(b) of the FRSA, it cannot also be a minor dispute over the terms and conditions of employment under § 3 of the RLA. Because resolu-

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[6] Section 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982).

tion of this case is governed by § 10(c) of the FRSA and not § 3 of the RLA, the district court did not have jurisdiction to grant an injunction under the RLA. And, since the dispute in this case is not arbitrable under a collective bargaining agreement between the parties, there is no jurisdiction to enter a *Boys Markets* injunction. *See Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397, 403-404 (1976). If there is jurisdiction to issue an injunction it must come from the FRSA.

In the *Chicago River* and *Boys Markets* cases, the Supreme Court found limited federal jurisdiction to enter labor injunctions despite § 4 of the Norris-LaGuardia Act in order to accommodate § 4 and its purposes with newer federal labor statutes and policies. *Boys Markets*, 398 U.S. at 250; *Chicago River*, 353 U.S. at 40. In *Boys Markets*, the Court carefully explained why the history of the enactment of labor legislation made it the "task of the courts to accommodate, to reconcile the older [labor] statutes with the more recent ones." Congressional labor policy had shifted, explained the Court, "without extensive revision of many of the older enactments." 398 U.S. at 250-51. In *Boys Markets* the task was to accommodate "the literal terms of § 4 of the Norris-LaGuardia Act . . . to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration." *Id.* at 250. The Court held that where an employer sought to enforce an agreement to arbitrate against a union that had gone on strike in violation of a no-strike agreement, injunctive relief would be available for use by a federal court to halt such a strike and prevent irreparable injury. The Court reasoned that

> the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, [and] the core purpose of the

> Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy . . . .

Id. at 253. In the earlier *Chicago River* case the Court had accommodated § 4 of the Norris-LaGuardia Act to § 3 of the Railway Labor Act. As explained by Justice Brennan in *Boys Markets*, the Court in *Chicago River* was

> confronted with a peaceful strike which violated the statutory duty to arbitrate imposed by the Railway Labor Act. The Court concluded that a strike in violation of a statutory arbitration duty was not the type of situation to which the Norris-LaGuardia Act was responsive, that an important federal policy was involved in the peaceful settlement of disputes through the statutorily mandated arbitration procedure, that this important policy was imperiled if equitable remedies were not available to implement it, and hence that Norris-LaGuardia's policy of nonintervention by the federal courts should yield to the overriding interest in the successful implementation of the arbitration process.

Boys Markets, 398 U.S. at 251-52.

We think the underlying principles of *Chicago River* and *Boys Markets* apply to this case. Pursuant to the teaching of the Supreme Court, we must accommodate the venerable Norris-LaGuardia Act with the purpose of the recently enacted FRSA. Congress intended that § 10 (b) disputes arising because of refusals to work under hazardous conditions be submitted under § 10(c) to swift resolution by the nonjudicial, binding procedures of § 3 of the RLA. But when a railroad's entire work force exercises its rights under § 10 to refuse to work under hazardous conditions, the work stoppage takes on the character of a contest of economic power, and the availability of arbitration procedures to mediate the dispute may be effectively nullified by the economic and social

pressures brought to bear. The present case presents this problem because the B&M is in a precarious financial condition and claims it would quickly become insolvent if a total work stoppage were to continue. Thus, if an injunction were not available in this case, and B&M collapsed or was forced by pressure to concede to the Union, the dispute would never be resolved as Congress intended. As the Supreme Court has said,

> [r]elegating safety disputes to the arena of economic combat offers no greater assurance that the ultimate resolution will ensure employee safety. Indeed, the safety of the workshop would then depend on the relative economic strength of the parties rather than on an informed and impartial assessment of the facts.

Gateway Coal Co. v. *United Mine Workers of America*, 414 U.S. at 379. Only the availability of injunctive relief can ensure that the FRSA will operate consistently with its purpose—which is to give employees the right to avoid hazardous conditions on the railroad, and to channel any such dispute into binding arbitration. The core purpose of the Norris-LaGuardia Act, which was to protect the young union movement from interference by federal courts guided only by their own concepts of labor-management relations "is not sacrificed by the limited use of equitable remedies to further [the] important [congressional] policy" behind the FRSA. *Cf. Boys Market*, 398 U.S. at 253.

We hold that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to order injunctive relief to prevent a refusal to work by an entire work force under § 10 of the FRSA from becoming economic combat and thereby preventing resolution of the dispute under the statutory procedures. The standard principles of equity apply to a request for injunctive relief in this setting:

> whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

Boys Market, 398 U.S. at 254 (quoting *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).

An injunction in a railway labor dispute over hazardous conditions is an extraordinary remedy. When a § 10 refusal to work occurs involving only a few employees it is unlikely that a railroad will be able to show irreparable harm will result if the stoppage is not enjoined. And when an injunction against a work stoppage is sought by a railroad, the court must also consider the alleged hazardous condition facing the employees. An injunction should not issue if it forces the employees, upon pain of contempt, to return to work and face a hazardous condition that the FRSA was intended to allow them to avoid. In most cases where an injunction enters, then, some provision must be made for protecting the employees. *Cf. Hanna Mining Company* v. *United Steelworkers of America*, 464 F.2d 565 (8th Cir. 1972) (per curiam) (a carefully crafted *Boys Markets* injunction was issued in the context of a safety dispute that enjoined a union walkout over hazardous conditions, enjoined continuance of the hazardous conditions, and ordered resort to arbitration). In this case, since the inconsistent flagging of construction sites charged by the Union could result in fatal crashes, the injunction should have included a provision ordering the railroad to take steps to ensure that there would be no work at construction sites unless adequate flagging was provided. We note that the appellants reported to B&M officials a near-hit between a train and construction machinery at an unflagged site as late as November 12, well after the temporary restraining order had halted the strike on November 4. Since an order to

fill flagging assignments or halt construction only requires B&M to comply with its stated policy it imposes no significant burden on it. And since a collision caused by lack of flagging could involve rush hour commuter trains, the public interest will be served by such an order.

Although there is some indication in the record that the B&M has corrected the flagging problems, and the Union claims it has no more reason to strike, the injunction issue is not moot. We agree with the district court that these facts did not moot the action because the Union is free to call a work stoppage again. "The possibility that [a party] may change its mind in the future is sufficient to preclude a finding of mootness." *United States* v. *Generix Drug Corp.*, 460 U.S. 453, 456-57 n.6 (1983); *see United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968); *Chicago and Northwestern Transportation Co.* v. *United Transportation Union*, 656 F.2d 274, 277 (7th Cir. 1981). We also find that without an injunction the B&M would be free in the future to allow inconsistent flagging practices. The need to enjoin any future unsafe flagging practices is therefore not moot.

We hold that this was not an illegal strike, but was a protected refusal to work under hazardous conditions pursuant to § 10(b) of the FRSA and that the district court was without jurisdiction to make findings of fact. The district court did have jurisdiction to issue a preliminary injunction pending resolution of this dispute by the National Railroad Adjustment Board. The injunction shall be modified so that it (*1*) requires the B&M to follow its stated policy of flagging at all construction sites on or near the tracks and (*2*) enjoins the Union from *calling a work stoppage so long as the B&M follows this policy.* The dispute is referred to the National Railroad Adjustment Board pursuant to § 3 of the RLA, 45 U.S.C. § 153. The B&M's action for damages is dismissed.

So ordered. No costs.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-4106-C

BOSTON AND MAINE CORPORATION,
Petitioner,

v.

R.M. LENFEST, JR., Individually and as Chairman of The General Committee of Adjustment, United Transportation Union (T), *et al.*,

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MEMORANDUM

November 27, 1985

CAFFREY, CH. J.

This is an action for a permanent or, alternatively, a preliminary injunction brought by the Boston and Maine Corporation (hereinafter the "B&M"), a common carrier by railroad engaged in interstate commerce transporting freight in New York, Massachusetts, Maine, New Hampshire, Vermont and Connecticut and transporting passengers in Massachusetts, New Hampshire and Vermont, against the General Committee of Adjustment, United Transportation Union (hereinafter the "Committee"), Roger M. Lenfest, Jr., Chairman of the Committee, and others. The Committee is a subordinate body of the United Transportation Union (hereinafter the "UTU"), an unincorporated association and a labor organization which represents persons employed as conductors and trainmen by the B&M for purposes of collective bargaining under the Railway Labor Act, 45 U.S.C. § 151 et seq. (hereinafter the "RLA"). The B&M claims, and

respondents do not dispute, that this case arises under the RLA and involves an amount in controversy exceeding the sum of $10,000.00, exclusive of interest, costs and reasonable attorneys' fees. The Court's jurisdiction is grounded upon 28 U.S.C. §§ 1331 and 1337.

This action stems from a general work stoppage and picketing on November 4, 1985 by members of the UTU, ordered by respondent Roger M. Lenfest, Chairman of the General Committee of Adjustment of the UTU. After a hearing in the afternoon and early evening of November 4, District Judge Frank J. Murray granted the B&M's request for a temporary restraining order enjoining the respondents from engaging in any such refusal to work until November 13, 1985. On November 12, 1985 the respondents filed a motion to dismiss the B&M's complaint on the grounds of lack of subject matter jurisdiction and failure to state a claim. A hearing on the preliminary injunction was held on November 14, 1985. At the close of the hearing, this Court extended the temporary restraining order pending its decision on the preliminary injunction.

At approximately 4:00 a.m. on Monday, November 4, 1985, members of the UTU appeared at various locations throughout the B&M system carrying signs indicating that the UTU was on strike. The strike caused a cessation of both B&M's passenger and freight services during the entire day of November 4. As a result, approximately 25,000 regular commuters on the B&M were forced to either find alternative transportation to and from work, or to stay home. The B&M also received numerous complaints about delays in and the lack of freight service. The strike was called by Lenfest on his own *ipse dixit* in his capacity as Chairman of the Committee. On Sunday, November 3, Lenfest decided to call the strike after informally discussing a strike with chairmen of various locals sitting on the Committee. The B&M received no notice whatsoever prior to the strike that a

work stoppage was to be called or why it was to be called. I find that Committee Chairman Lenfest made himself inaccessible to the B&M officials on the morning of the strike. The first thing the B&M was able to learn about the reason for the strike was from picketing conductors and trainmen. When questioned by B&M officials, they stated that it involved safety.

Respondents now assert that the reason Committee Chairman Lenfest called the strike was that the B&M repeatedly had failed to provide flagging at construction sites along the railroad to alert oncoming trains that there might be workers on or near the tracks. Lenfest testified at the hearing on November 4 that the B&M's failure to provide flagmen at various unidentified times and locations had created unsafe working conditions. Lenfest could not recall any such unsafe conditions existing during the week prior to November 4. On May 3, 1985, approximately six months earlier, the UTU filed a notice pursuant to Section 6 of the RLA, 45 U.S.C. § 156, with respect to the B&M's failure to provide flagging protection. A meeting between the B&M and the UTU over this notice took place on June 5, 1985. At the present time, the matter is pending before the National Mediation Board.

At the hearing on November 14, Lenfest testified that prior to calling the strike he had received reports of a failure to provide flagging protection at four or five specific locations. In light of Chairman Lenfest's inability to provide any information on November 4, the day of the strike, regarding specific instances of the B&M's failure to provide flagging protection on its tracks, the Court is skeptical of his claimed ability to do so on November 14. While it is doubtful from the record whether Lenfest knew on November 4 of any presently or recently existing unsafe conditions resulting from the B&M's failure to provide flagging protection along the B&M system, it is clear and I find that Lenfest never

notified anyone at B&M of specific situations of non-flagging. I find that at certain times prior to November 4 Lenfest expressed his general concern to B&M Assistant Manager of Crew Dispatching, Roger Audette, that flagging be provided and that only UTU members do the flagging. However, I also find that Lenfest never reported any specific instances of B&M's failure to provide flagging. Audette testified that the last time he spoke with Lenfest was on October 25 and that Lenfest did not mention flagging or a possible work stoppage. Lenfest, by his own admission, never discussed the flagging problem with anyone at B&M other than Audette. John Rafferty, the Chief Inspector of the Construction Department at B&M, testified that it is solely his responsibility to decide whether to give flagging protection to a contractor and that no one has ever informed him that contractors were working without flagging protection. John J. Cronin, the Senior Director of Labor Relations at B&M, testified that he was never requested by anyone to confer over the B&M's failure to provide flagging. Cronin is the officer within B&M to whom such a request should be made.

At the November 14 hearing, William Kempton, a locomotive engineer for the B&M, testified that on October 2 his train nearly collided with a tractor trailer carrying railroad ties across the tracks. Kempton testified that he did not see a flagman anywhere near the tracks. Leo MacDonald, a yardman for the B&M working in Boston Yard 14, testified as to a near accident between a locomotive and a crane in the railroad yard on November 1. MacDonald testified that the lack of flagging in the yard created an unsafe condition which caused him to refuse to work on November 4. Although MacDonald met with Chairman Lenfest on November 3, he testified that he did not mention this near accident, nor did he inform the B&M he would cease working unless a flagman was placed in the yard.

The B&M contends that respondents' system-wide work stoppage on November 4 constituted an illegal strike because respondents failed to employ the dispute resolution procedure for "minor" disputes set forth in Section 3 of the RLA, 45 U.S.C. § 153. The B&M seeks an injunction to temporarily or permanently enjoin the respondents from striking and picketing. Respondents argue that their work stoppage was not a strike over either a "minor" or a "major" dispute and that they therefore had no legal obligation to proceed under the procedures set forth in Section 6 or Section 3 of the RLA; they claim that the work stoppage was a valid refusal to work under hazardous conditions pursuant to Section 10 of the Federal Railroad Safety Act, 45 U.S.C. § 441 (hereinafter the "FRSA"), as amended. The respondents vigorously contend that because they have invoked the protection of Section 10 of the FRSA, this Court does not have jurisdiction to issue an injunction against the work stoppage. For the reasons discussed below, the Court agrees with petitioner B&M and rules that it is entitled to a preliminary injunction enjoining respondents from a general work stoppage such as that which Committee Chariman Lenfest called on November 4.

Section 4 of the Norris-LaGuardia Act deprives federal courts of "jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute." 29 U.S.C. § 104. Therefore, absent an exception to the Norris-LaGuardia Act, this Court cannot exercise jurisdiction to enjoin the respondents in this action. The United States Supreme Court has held that the Act is not a bar to an injunction in a case for which the RLA provides the process for final decision. *Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 42 (1957). A district court may enjoin either party from altering the status quo during the course of a Section 6 "major" dispute resolution proceeding. *Carbone v. Me-*

serve, 645 F.2d 96, 98 (1st Cir. 1981). Once the Section 6 procedures have been exhausted, however, the Norris-LaGuardia Act operates to deprive a district court of jurisdiction to grant injunctive relief. *Missouri-Kansas-Texas Railroad Company v. Brotherhood of Railroad Trainmen*, 342 F.2d 298, 299 (5th Cir. 1965). Where either party to a dispute resorts to self-help in a "minor" dispute, a district court may enjoin that party as long as the non-striking party can make the traditional showing of irreparable harm. *Carbone*, 645 F.2d at 98. Therefore, it is necessary to determine whether this case involves a "major" or a "minor" dispute, or neither.

Congress distinguished between disputes which are required to be handled pursuant to Section 6 of the RLA, 45 U.S.C. § 156, and those which are to be handled pursuant to Section 3, 45 U.S.C. § 153. The United States Supreme Court explained the distinction between Section 6 and Section 3 disputes, saying that "major" disputes are to be resolved under the procedures of Section 6 and "minor" ones under Section 3:

> [A 'major' dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class, [minor disputes], contemplates the existence of a collective agreement already concluded or . . . a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some

> incident of the employment relation, or asserted one . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723 (1945).

The RLA creates a process of noncompulsary adjustment for "major" disputes. Section 6 of the RLA, 45 U.S.C. § 156, sets forth detailed procedures for negotiation, mediation before the National Mediation Board, and arbitration. If a "major" dispute is not resolved after the parties have exhausted these dispute resolution mechanisms, the parties may resort to self help. Where the dispute is only "minor" the parties are not free to resort to self-help after exhausting the settlement procedures prescribed by Section 3. Instead, the National Railroad Adjustment Board has the authority to impose a binding settlement on the parties. *Elgin, Joliet & Eastern Railway Co.*, 325 U.S. at 724-728 (1945).

In this case petitioner B&M contends that the dispute with respect to flagging is a "minor" dispute to be resolved by Section 3 binding arbitration and that it has made a showing of irreparable harm. There is no question that respondents have not sought to invoke the dispute resolution machinery of Section 3. The B&M also asserts that it has made a showing of irreparable harm. Accordingly, the B&M argues that this Court has jurisdiction to issue an injunction against the November 4 general work stoppage by respondents. Notwithstanding the UTU's filing of a Section 6 notice with respect to the flagging issue on May 3, 1985, the respondents now argue that the flagging issue is neither a "major" nor a "minor" one under the RLA. Respondents argue instead that the November 4 work stoppage was a refusal to work under hazardous conditions, within the meaning of Section 10 of the FRSA, 45 U.S.C. § 441, as amended.

Respondents further contend that the exclusive remedy under Section 10 of the FRSA is binding Section 3 (RLA) arbitration. I rule that the dispute over the B&M's alleged failure to provide flagging in this case is a "minor" dispute, that the petitioner B&M has made a showing of irreparable harm, and that Section 10 of the FRSA does not apply to this case. Accordingly, I rule that this Court has jurisdiction to enjoin the respondents' general strike.

In *Missouri-Kansas-Texas Railroad Co. v. Brotherhood of Railroad Trainmen*, 342 F.2d 298 (1965), the Court of Appeals for the Fifth Circuit was faced with the question whether the alleged failure of the railroad to provide union employees safe working conditions was a "minor" or a "major" dispute under the RLA. After reviewing the Supreme Court's differentiation of those terms in the *Elgin* case, the court held that such a dispute was, indeed, a "minor" dispute to be resolved pursuant to Section 3 of the RLA. The court explained:

> It is true that there is no express written provision in the existing collective agreement between the parties with respect to the working conditions of which the defendant complains. But the common law duty of the plaintiff to use reasonable care in furnishing its employees with a safe place to work is clear, [citation omitted].

Id. at 300. A "minor" dispute, to be handled pursuant to the dispute resolution procedure of Section of the RLA, involves a claim which, in the words of the Supreme Court in *Elgin*, "is founded upon some incident of the employment relation . . . to rights accrued, not merely to have new one created for the future." *Elgin, Joliet & Eastern Railway Co.*, 325 U.S. at 723 (1945). In summary, employees have a legal right to safe working conditions, whether or not the collective bargaining agreement contains a provision to that effect. That right is an in-

cident of the employment relation and any dispute concerning that right is a "minor" dispute to be processed under Section 3 of the RLA.

This Court therefore has authority to enjoin a strike over this dispute if petitioner has made a showing of irreparable harm. The Court finds from testimony presented at the November 4 and November 14 hearings, particularly the testimony of James R. Stoetzel, General Manager of Commuter Service of B&M, and Erwin R. Towle, General Superintendent of the Central Division, Freight of B&M, that B&M has made a sufficient showing of irreparable harm. Moreover, Peter W. Carr, Vice-President Finance Officer of the B&M, and Thomas J. Reilly, also Vice-President Finance Officer of the B&M, stated in affidavits that the B&M is in financial difficulty and dependent upon its ability to maintain a sufficient cash flow on a daily basis. They also stated that continued work stoppage would cost the B&M approximately $492,000 per day and make it extremely unlikely that the B&M could maintain sufficient cash flow to continue its operations.

Respondents argue in their memoranda of law and at the November 14 hearing that the November 4 work stoppage was not a strike over either a "major" or a "minor" dispute: to the contrary, they argue that it was a refusal to work under hazardous conditions. Refusals to work are governed by Section 10 of the FRSA, 45 U.S.C. § 441, as amended. Section 10 reads in pertinent part:

> (b) Refusal to work under hazardous conditions
>
> (1) A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if—

(A) the refusal is made in good faith and no reasonable alternative to such refusal is available to the employee;

(B) the hazardous condition is of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that—

(i) the condition presents an imminent danger of death or serious injury; and

(ii) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory channels; and

(C) the employee, where possible, has notified his employer of his apprehension of such hazardous condition and of his intention not to perform further work unless such condition is corrected immediately.

(c) Resolution of disputes

(1) any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

Respondents contend that subsection (c)(1), which provides that "any dispute . . . arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title (Section 3 of the RLA)", means that Section 3 binding arbitration is the exclusive means for resolving disputes over refusals to work under hazardous conditions. Respondents also contend, without directing the Court to any supporting authority, that it is not for this Court to decide whether the respondents properly fulfilled the terms and conditions of the FRSA. That question, respondents argue, is exclusively a question for an arbitrator, selected in accordance with the procedures of Section 3, to answer.

This Court need not decide whether a district court could exercise jurisdiction over a dispute in which a party has properly invoked the protections of 45 U.S.C. § 441(b)(1) and (c)(1) because this is not such a case. The purpose of Section 10 of the FRSA is clear; it protects a railroad employee from retaliatory action by his employer for a refusal to work under hazardous conditions, after the employee has apprised the employer, where possible, of those conditions and informed the employer that he will not perform further work unless the conditions are made safe. The Legislative History to Section 10 of the FRSA states:

> the legislation provides essential protection for the rights of railroad employees. The legislation ensures that certain protections of the Occupational Health and Safety Act (OSHA) are extended to railroad employees . . .
>
> The Committee has been informed of many complaints over the years of harassment in situations where a worker notifies authorities of violations, testifies in safety proceedings or institutes an action against a railroad. According to these complaints, harassment includes, but is not limited to, firing, verbal abuse, disproportionate dangerous assignments, and constant and unrelenting supervision. Such retaliatory actions by employers are not to be tolerated in the work place. Section 10 of the bill provides protection for the rail worker under these circumstances. The legislation would forbid discrimination against an employee for, among other things, reporting such violations. Similarly, the legislation would forbid a railroad from discriminating against an employee who refused to work in hazardous conditions presenting an imminent danger of death or serious injury. The Committee strongly believes employees should not be forced to choose between their lives and their livelihoods.

1980 U.S. Code Cong. and Adm. News § 832.

The purpose of Section 10 of the FRSA was to allow an employee or employees *personally* faced with a hazardous situation to walk off a job without the fear of retaliation by their employer. In this case, Committee Chairman Lenfest called a general strike of all B&M employees controlled by the UTU General Committee of Adjustment. At the hearing on November 4, the day of the strike, Lenfest could not tell District Judge Murray of any particular present or recent unsafe conditions, resulting from the failure of B&M to provide flagging, confronting any employee on the B&M system. Lenfest's testimony on November 4, which at best could be characterized as evasive, was that he called a general strike because of past instances where the B&M failed to provide flagging protection at construction sites along the B&M system. Ten days later, at the November 14 hearing, Lenfest said he was able to identify four or five locations along the B&M system where he had received reports in the past that there was inadequate flagging protection. Furthermore, two B&M employees, William Kempton and Leo MacDonald, testified that they had witnessed near-accidents resulting from inadequate flagging protection.

Section 10 of the FRSA was not intended to provide a shield to protect unions from injunctive relief against illegal general strikes. Respondents, after engaging in an illegal general strike, argue that this statute protects them from injunctive relief. The Court rules that the statute does not provide such protection. Even if the statute did apply to this case, respondents failed to comply with the requirements of subsection (b) (c) (1) to notify the B&M of any specific hazardous conditions existing on the railroad and of their intention not to perform further work unless such condition is corrected immediately. Section 10 plainly does not apply to the facts of this case.

The Court's decision in this case is not a deterrent to railroad employees *personally* faced with hazardous conditions invoking the protection of Section 10. Whenever

an individual railroad employee is *personally* faced with imminent danger of death or serious injury and there is insufficient time to resort to regular statutory channels of dispute resolution, that employee may notify his employer that he refuses to perform further work unless the dangerous condition is corrected immediately. This is not to say, however, that one man's danger affords any basis at all in law or in fact for a system-wide strike by hundreds of other employees who are not personally exposed to that danger.

In addition to arguing that the B&M's complaint must be dismissed because of lack of subject matter jurisdiction and failure to state a claim, the respondents argue that this action is moot. At the November 14 hearing, Committee Chairman Lenfest testified that the B&M has represented to him that any problems regarding the failure to provide flagging have been corrected. Therefore, the respondents argue that there would be no reason to stop working and an injunction would serve no purpose. The Court disagrees and rules that this case is not moot.

The fact that a party voluntarily discontinues an illegal activity does not necessarily moot an action. *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *Walling v. Helmeric & Payne, Inc.*, 323 U.S. 37 (1944). In *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), the Supreme Court explained that if a case is held to be moot:

> [t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practice settled, militates against a mootness conclusion. [citation omitted]. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. [citation omitted]

In a case factually similar to the instant action, the Court of Appeals for the Seventh Circuit held that an appeal from an injunction against a strike was not mooted by the union's representation that it had lost interest in

striking. *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277 (7th Cir. 1981). *See also United States v. Generix Drug Corp., et al.*, 460 U.S. 453, 457 n.6 (1983) ("The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness.").

The respondents argue that, under the facts of this case, they had a legal right to engage in a widespread work stoppage. If this Court declined to issue an injunction at this time, the respondents would be free to engage in another widespread work stoppage if another dispute over an alleged failure to provide flagging anywhere on the railroad develops. The Supreme Court has said that where a defendant continues to assert the legality of the challenged conduct, that is a factor which tends to show that the case is not moot. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42-43 (1944). Here, the fact that respondents steadfastly maintain the legality of a general strike in this situation shows clearly that this case is not moot. I rule that the respondents have not carried their "heavy" burden of showing that "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

In summary, I rule that petitioner has carried its burden of proving that it would probably prevail after a full hearing on the merits and will suffer irreparable harm if respondents are not enjoined. The record also shows that substantial harm would be visited upon a substantial segment of the public, namely the 25,000 commuters who rely on the B&M to get to and from their place of employment daily, as well as their employers and those who regularly rely on the B&M's freight service. Respondents have failed to show that they would suffer any irreparable harm if this clearly illegal strike is enjoined.

Order accordingly.

/s/ Andrew A. Caffrey
ANDREW A. CAFFREY, Ch. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-4106-C

BOSTON AND MAINE CORPORATION,

Petitioner

v.

R. M. LENFEST, JR., Individually and as Chairman of General Committee of Adjustment, United Transportation Union (T), J. F. FISKE, JR., Individually and as Vice Chairman of General Committee of Adjustment, United Transportation Union (T), P. E. McHUGH, Individually and as Secretary of General Committee of Adjustment, United Transportation Union (T), RICHARD A. CHARTRAND, T. G. CROMWELL, JOHN F. FISKE, C. L. HARRIS, JOSEPH B. KUCHIESKI, ALBERT H. LEBERT, LEO J. MACDONALD, CHARLES W. PAIGE, JR., GEORGE E. QUACKENBUSH, WILLIAM J. RABBITT, R. J. SAWYER, W. C. TAYLOR, ROBERT J. WRIGHT, JOSEPH SYLVAIN, C. J. TREMBLAY, R. J. MORANI and D. M. PERIGNY, Individually and as Local Chairmen of General Committee of Adjustment, United Transportation Union (T),

Respondents

MEMORANDUM AND ORDER

MURRAY, Senior District Judge

This case came on to be heard by the court on Petitioner's motion for temporary restraining order, after notice to certain respondents, on the testimony of witnesses and the affidavits of Peter W. Carr, Thomas J. Reilly, James R. Stoetzel, William V. Furey, John J. Cronin, Colin Pease, Dennis P. Coffey and B. E. Rice, Jr., to enjoin the respondents from carrying out a strike

against Petitioner and continued picketing of Petitioner's properties which may violate the Railway Labor Act. Petitioner is a railroad corporation carrying on commuter and freight operations in Massachusetts and other New England states.

From the evidence before the court it was shown that the strike which commenced at approximately 4:30 A.M. on November 4, 1985, and was continuing when the court was engaged in hearing the Petitioner's motion, caused the cessation of the commuter service operated by the Petitioner for and on account of the Massachusetts Bay Transportation Company, and resulted in disrupting the commuting services to and from Boston of an estimate[d] 45,000 persons. In addition, the strike interrupted the freight service operated by Petitioner and resulted in a work stoppage of Petitioner's employees, who played no part in causing the strike, and disrupted the daily cash flow on which Petitioner depends to continue its operation.

The strike was not authorized by the International Officers of the United Transportation Union (T), a labor union with which Petitioner has contractual relations under a labor agreement governing the wages, hours, and conditions of employment of its members, including the individual respondents.

Petitioner's officers and counsel were unable to reach the respondent Lenfest after the strike commenced or at any time during the day until the court opened the hearing on Petitioner's motion, and thus the officers were kept in the dark as to the reason the strike was called. It was only after the court granted a recess of the proceeding that Petitioner learned that respondents claimed Petitioner failed to guard against unsafe conditions on railroad property due to unfulfilled custom and usage in "flagging" assignments. The evidence was that in the week before the vote to strike was taken on November 3, 1985, there was no knowledge on the part of the respond-

ent Lenfest (the only witness for the respondents) of any unsafe condition that required "flagging" anywhere on the railroad.

The court finds that the respondents had no valid cause for striking against Petitioner. Moreover, the court finds that the strike will cause irreparable harm to Petitioner unless injunctive relief is granted; that there is strong likelihood that Petitioner will be successful on the merits of its claims against the respondents; that the irreparable harm which will result to Petitioner if injunctive relief is denied outweighs any harm which may befall the respondents from the granting of the injunction; that the public interest will not be adversely affected by the granting of injunctive relief.

Upon the Petitioner's giving of security in the amount of $10,000, an order shall issue enjoining the respondents, individually and as officers of the General Committee of Adjustment, and all persons acting in concert with them, from authorizing, calling, encouraging, permitting, engaging, or continuing in a strike or work stoppage or picketing against the Petitioner forthwith.

This temporary restraining order shall expire at 6:00 P.M. on November 13, 1985, unless it is further extended by order of the court.

Issued November 4, 1985
at 8:40 P.M.

/s/ Frank J. Murray
Senior District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1039

BOSTON AND MAINE CORPORATION,
Petitioner, Appellee,

v.

R.M. LENFEST, JR., INDIVIDUALLY AND AS CHAIRMAN OF THE GENERAL COMMITTEE OF ADJUSTMENT, UNITED TRANSPORTATION UNION (T), *et al.*,
Respondents, Appellants.

JUDGMENT

Entered: September 2, 1986

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court enjoining the appellants is vacated and the cause is remanded to the district court with instructions of issuing an injunction in accordance with the opinion filed this day and to refer the dispute to the National Railroad Adjustment Board. No costs.

By the Court:

/s/ Francis P. Scigliano
Clerk